No. 87-1516

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

ANTHONY M. FRANK, in his capacity as Postmaster General of the United States Postal Service,

Petitioner,

v.

DARLENE SHIDAKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	2
STATEMENT OF FACTS	3
1. Promotion Procedures	3
2. Petitioner's Contention in the District Court	6
3. Statistics	6
4. Procedural History of the Case	7
REASONS FOR DENYING THE PETITION	8
1. The Petition Requires the Court to Review Evidence and the Findings of the District Court	8
2. Petitioner's Present Assertion That the Promotion Procedures Were Subjective Contradicts His Position in the District Court	10
3. The Petition Seeks Review of an Interlocutory Order	11
4. *Watson v. Fort Worth Bank & Trust Co.* Has No Similarity To This Case	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: *Page*

American Construction Co. v. Jacksonville, T. & R. Co., 148 U.S. 372 (1893) 11

Firemen v. Bangor & Aroonstock R. Co., 389 U.S. 327 (1967) 11

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 11

Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987) 8

Page v. Bolger, 645 F. 2d 277 (4th Cir. 1981) 3

Texas v. Mead, 465 U.S. 1041 (1984) 8

United States v. Johnson, 268 U.S. 220 (1925) 8

Watson v. Fort Worth Bank & Trust Co., No. 86-6139 ..... 2, 11

Statutes and Regulations:

42 U.S.C. § 2000e *et seq.* ..... 2, *passim*

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Respondent, Darlene Shidaker, the plaintiff below, files this brief in opposition to the petition for writ of certiorari of Anthony M. Frank, Postmaster General of the United States.

PRELIMINARY STATEMENT

The sole issue raised by petitioner for review is whether the respondent has stated a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on disparate impact resulting from a subjective promotion practice or procedure. The petitioner points out that a similar issue is raised in *Watson v. Fort Worth Bank & Trust Co.*, No. 86-6139, and requests that the Court hold its petition in abeyance until the issuance of the decision in *Watson*.

For four reasons, the Court should not hold this case pending *Watson* nor grant the petition for writ of certiorari.

First, the petition requires the Court to review the evidence on the nature of the promotion procedures and to overturn a specific finding of fact on this issue. After receiving the evidence at trial, the district court specifically found that the promotion procedures were in part objective and that the petitioner took steps to objectify the promotion process. The petition asks that this finding be overturned.

Second, contrary to the position he now takes in this Court, petitioner consistently argued to the district court that the promotion procedures and criteria were objective. Petitioner urged the district court to make such a finding. The district court made such a finding, and the petitioner did not assert in its appeal that the finding was clearly erroneous. Thus, if the Court accepts this case for review, it will be required to weigh evidence and reverse findings of fact before ever reaching the legal issue raised by the petitioner. The Court will also be required to grapple with the fact that the petitioner himself asserted a position directly contrary to the one he now argues.

Third, this case is still in an interlocutory stage with an incomplete factual record. The court of appeals in its two prior opinions remanded the case for the taking of further evidence. The court of appeals held only that the

respondent made out a *prima facie* case, and has given the petitioner an opportunity to assert any defense it chooses on remand. If the Court's decision in *Watson* should require a re-examination of this case, the district court, which is most familiar with the evidence, is in the best position to perform this re-examination. If the respondent wins on remand, the petitioner will still have the opportunity to seek review in this Court. If the petitioner wins on remand, a review by the Court may be unnecessary.

Fourth, as a factual matter, the promotion selection devices in this case and in *Watson* are markedly different, and *Watson* can have no application to this case.

STATEMENT OF FACTS

1. Promotion Procedures

Respondent, a Postal Service employee since 1962, had been the postmaster of the Kenilworth, Illinois Post Office since 1964 at a salary level of PES 18. Pretrial Order Statement of Uncontested Facts (A.F.) No. 1. In 1977, she applied for promotion to three postmaster positions at larger post offices in Palatine, Glenview and Franklin Park, each of which commanded a higher PES 22 salary level. A.F. No. 22, App. 17a-18a.

The specific procedures for promotion are contained in the Postal Service *Personnel Handbook*, P-11, TL-4, Pl. Exh. No. 23 at 17; Tr. 54-55, 75, 131-133; *Page v. Bolger*, 645 F. 2d 277 (4th Cir. 1981). A Postmaster Screening Board (the Board) is set up in accordance with these procedures to review applicants for postmaster positions. The Board is composed of four persons, two directors from other Postal Service districts and two postmasters. App. 19a, Pl. Exh. No. 23, Tr. 117-118, 130-133, 319, 375.

The Board, in the first instance, reviews the qualifications of the applicants for promotion. Tr. 54. The Board reviews certain forms and documents relating to the candidates and then scores each applicant. The score of each

individual Board member is added up, and the candidates are then ranked on the basis of total points received. App. 19a-21a.

There were a number of standardized Postal Service forms the Board reviewed. First was the applicant's "Personal History Summary" or Form No. 991, Pl. Exh. No. 23, 33, Tr. 57, which contained the applicant's education background, Postal Service courses taken and employment experience. *Id.*; Tr. 56. Another form reviewed was the "Estimate of Potential," known as Form No. 2577, prepared by the immediate supervisor of the candidate. Part A of the Form No. 2577, entitled "Potential Ability," lists five subject areas to be rated and nine categories of ratings. *Id.*; App. 19a-21a.

Another form is the five page "Analysis of Experience, Background and Potential," Pl. Exh. No. 33, which requires answers with specific data to questions regarding labor relations, equal employment opportunity, decision making, problem solving, budget operations, employee development, supervision of branch operations, planning and scheduling of work, safety and health, customer and community relations, and the amount of unused sick leave. *Id.*

The Board members testifying at trial stated that they relied on extensive statistical data on the operations of the post offices managed by each applicant. The Board considered data on budgets, routes and delivery systems, hours of work of employees, time for deliveries, equipment used and other services of the post offices of applicants. Tr. 65-73, 107-112, 136-140, Jt. Exh. 24, Pl. Exh. No. 12, 23, Def. Exh. No. 1-5, 94-95.

Each Board member, after reviewing these forms, gave a grade to each candidate. The scoring system was as follows:

Outstanding candidate:	8-7
Very good candidate:	6-5
Acceptable candidate:	4-3

The scores of each member were then totalled and all those who received a score of 20 and above were referred for further review by the Regional Management Selection Board, which then made a recommendation to the Postmaster General. App. 21a. This process was standardized for all promotions. A standardized report was prepared by the panel stating the results, ranking of candidates, and the reasons for rejection of those not referred further. Jt. Exh. 3-7; 9-12; 14-17, 19-20, 26; Def. Exh. No. 7- 12; 96-98.

Respondent scored less than 20 and was thus eliminated from further consideration. For the Glenview position, respondent ranked 13 out of 32; for Palatine, respondent ranked 16 out of 32 applicants; for Franklin Park, she ranked 15 out of 28. App. 21a-22a.

The petitioner has a policy of promoting from within, rather than hiring for higher level positions, and experience and training within the Postal Service are keys to promotion. App. 19a; Tr. 49-53. Since there are no special qualifications for higher level postmaster positions, the primary basis for determining the relative qualifications of a candidate was his or her experience as a postmaster in a larger post office or in the Officer in Charge (OIC) program. The OIC program offered postmasters direct training for higher level postmaster work. Jt. Exh. No. 7, 14, 17; Def. Exh. No. 7-12, 96-98. Pl. Exh. No. 23 at 6, 14-20, Tr. 338-342, 348-9, 70, 305-08, 294-95, 297, 400.

Female employees were underrepresented in receiving OIC experience. For the year prior to the promotions in issue, less than 10% of OIC assignments were held by women, even though they held 21% of the postmaster positions. Pl. Exh. No. 23 at 14-18; Def. Exh. No. 104.

2. Petitioner's Contentions in the District Court

Although the petitioner in this Court characterizes the promotion procedures just described as "subjective," this was not his argument in the trial court. Quite the contrary, at virtually every stage of the trial, petitioner argued that the promotion procedures were, in fact, objective. In his opening statement, counsel asserted that the three forms and other materials used by the Board were objective and essentially statistical. Tr. 21-25, 28-30. At a later stage in the trial, counsel argued that the forms were objective and based on "measurable objective data," and the evaluation by the panel itself was "objective." Tr. 171-75. In closing argument, counsel repeated that the promotion procedures "were in fact objective and demonstrated to be so," Tr. 418, 427, and that the materials used were "not subjective." Tr. 174-76.

The district court, in holding that these promotion procedures may be considered under a disparate impact test, found that they had "both objective and subjective parts," App. at 35a, but that "[w]hile most of the material relied upon by the screeners was subjectively derived, the Screening Board made an effort to objectify its decision." App. at 42a. Petitioner did not challenge any of these findings on appeal. Because these findings were not in issue on appeal, the court of appeals did not reach the question of the applicability of disparate impact analysis to subjective decision making.

3. Statistics

At trial, respondent presented statistics demonstrating that the promotion procedures restricted females in the North Suburban MSC (the area covering the Northern District of Illinois) and nationally to PES 18 level and below. In the North Suburban MSC, women held 21% of the postmaster positions, yet none was rated over a PES 20, and more than 65% of the female postmasters were PES 15 and

below. Only 5% of those postmasters over PES 19 were female, even though women held 29% of the total positions in the North Suburban MSC. While men comprised approximately 70% of the work force, 95% of those over PES 19 were male. App. 24a.

Nationally, female underrepresentation in the upper level PES positions mirrored that in the North Suburban MSC. Although females comprised approximately 21% of the national workforce, they held only 11.5% of the PES 15 and above positions. App. 24a. Men were eight times more likely than women to be promoted to PES 19 positions and above. Pl. Exh. No. 23 at 13.

A report circulated to petitioner's employees by the Postmaster General of the United States stated that "white males had . . . three times greater success than women" in attaining high level positions. The report detailed underrepresentation of females in all of the upper level positions of the Postal Service, and concluded that there was serious discrimination against women. Pl. Exh. No. 48 at 2.

The Postal Service presented no other statistics on the promotions or PES levels of females, nor any other evidence seeking to explain or to refute the statistics which the respondent presented. In answers to interrogatories after remand, petitioner admitted that because "men tended to be found in proportionately greater numbers in supervisory and managerial positions than women . . . they would gain the experience necessary for advancement to higher-level positions in proportionately greater numbers than women." Resp. to Interrogatories 3 *et seq.* at 2.

4. Procedural History of the Case

The district court, after trial, held that respondent failed to prove a *prima facie* case of disparate impact because of the absence of applicant flow statistics. In its first decision on respondent's appeal, the court of appeals reversed the judgment for petitioner, holding that

the statistics had made out a *prima facie* case of disparate impact. The court remanded for further evidence and stated that the petitioner could raise any number of defenses to respondent's *prima facie* case. Petition at App. 22a-23a.

In his first petition for writ of certiorari, the petitioner raised the same issue he raises now: whether subjective decision making is subject to a disparate impact analysis. The petitioner also raised the issue whether the underrepresentation statistics presented by the respondent were sufficient to establish a *prima facie* case of disparate impact.

This Court granted the petitioner's first petition, vacated the court of appeals' decision and remanded for further consideration in light of *Johnson v. Transportation Agency*, 107 S.Ct. 1442 (1987), which discussed the second issue, *i.e.*, underrepresentation statistics.

On remand, the court of appeals re-adopted its prior decision, held that the respondent's statistics presented a *prima facie* case of disparate impact and remanded the case to the district court for further consideration..

The Postmaster General again seeks to have this case held in abeyance while yet another decision, *Watson v. Fort Worth Bank & Trust Co.*, is considered.

REASONS FOR DENYING THE PETITION

1. The Petition Requires the Court to Review Evidence and the Findings of the District Court.

Certiorari should be denied when the issue presented for review turns on an analysis of specific evidence and will require the Court to review findings of fact by the district court. This Court has stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see, Texas v. Mead*, 465 U.S. 1041 (1984) (Opinion of Justice

Stevens). In the instant case, the petitioner asks the Court not only to review specific findings of fact, but to reverse findings which were not even challenged in the court of appeals.

Although the petitioner urges the Court to decide whether a disparate impact analysis applies to subjective decision making, the record contains substantial evidence that the promotion procedures were, in fact, objective. This was the position asserted by the petitioner himself in the trial court. The district court, as a result, found that the procedures were in part objective and that the Board sought to objectify its decision-making. The petitioner did not appeal this finding in the court of appeals.

The record amply demonstrates that the promotion procedures and the criteria considered by Board members were, in fact, objective. The four member all-male panel, some of whom were not personally acquainted with candidates, reviewed standardized forms. Those forms contained scores for certain performance categories and statistical data on the candidates and the operations of the post offices managed by them. After review of that data, Board members individually applied a scoring system of 3 through 8. The candidates were then ranked on the basis of the total scores, and a cut-off score of 20 was made.

Each Board member who testified stated that the most important basis for his grade was the objective criteria relating to the prior experience and training of the candidate. A candidate was rated higher if he or she had experience managing a large post office or had OIC experience. Because female postmasters were at lower PES levels and were not given a sufficient number of OIC training assignments, they did not have as much managerial experience as male postmasters. Petitioner admitted that the failure of females to receive these managerial assignments caused their disproportionately low success rate in promotions to higher level PES postmaster positions.

The premise underlying petitioner's claim for certiorari is that the procedures challenged by the respondent were subjective. Neither the evidentiary record nor the district court's findings of fact supports this premise. Thus, the issue presented by petitioner would require this Court to review the record and reverse findings of fact before reaching the legal issue presented by the petitioner.

2. Petitioner's Present Assertion That the Promotion Procedures Were Subjective Contradicts His Position in the District Court.

Although the petitioner now bases his petition on the contention that the evaluation procedures were subjective, he consistently asserted in the district court that the procedures were objective and urged the court to so find. After the district court entered the requested findings, the petitioner did not claim in the court of appeals that such findings were clearly erroneous. Petitioner should not now be permitted to argue a position directly contrary to the one he asserted below. Counsel for petitioner argued at great length in the trial court that the forms and the procedures of the Board were objective and that the promotion decisions were based in large part on statistics and measurable objective data. In closing, the petitioner argued that the promotion procedures were "in fact objective and demonstrated to be so." Tr. 418. Each witness produced by the petitioner testified that his decision was entirely objective and based on objective data, including the extent of the candidate's experience in managing larger post offices or in prior OIC experience.

Petitioner should not be permitted at this point to change his position and create a fictional legal issue for this Court to consider.

3. The Petition Seeks Review of an Interlocutory Order.

This Court has stated that certiorari should not be granted until a final decree is issued unless it is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & R., Co.*, 148 U.S. 372, 384 (1893). Lack of finality may "of itself" furnish "sufficient ground for denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Firemen v. Bangor & Aroonstock R. Co.*, 389 U.S. 327, 328 (1967).

The court of appeals has remanded this case for further evidence and findings by the district court and has not precluded the petitioner from presenting any defense it might have to respondent's *prima facie* case.

It is possible that the petitioner will yet win this case. Certainly, after further trial, the record will be more developed on factual issues that the petitioner requests this Court to consider now. The petitioner has not demonstrated there will be any extraordinary inconvenience, embarrassment or dire consequences if this Court defers review of this case until the record is further developed and a final judgment is entered. At this interlocutory stage, the case is not ripe for this Court's review.

4. Watson v. Fort Worth Bank & Trust Co. Has No Similarity To This Case.

The facts in this case are not at all similar to those in *Watson v. Fort Worth Bank & Trust Co.* In *Watson*, an individual supervisor, without any criteria or scoring system, simply chose the person he liked best.

Here, the promotion procedures were highly structured. There was a four member board selected on the basis of objective criteria. The Board completed a number of standardized forms which evaluated the candidates in at least 15 specific areas of performance. Members of the

Board relied on statistical data on the operations of the post offices supervised by the candidates in reaching their final grades. A standardized numerical scoring system was used, and a uniform cut-off score was applied. Each of the candidates was ranked on the basis of his/her scores. None of these objective features was present in *Watson*. Unlike the handful of candidates considered in *Watson*, there were approximately 30 candidates for each of the three postmaster positions here. Thus, it is unlikely that *Watson* would have any application to this case.

Even if *Watson* should be considered, however, given the interlocutory nature of the case, there is no reason why the district judge, to whom the case has been remanded and who is most familiar with the evidence presented, should not be the first one to consider these issues.

CONCLUSION

Respondent respectfully requests the Court to deny the petition for a writ of certiorari.

Respectfully Submitted,

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